89-559

No. _____

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

RUSSELL EMORY ATKINS

Petitioner

vs.

STATE OF WEST VIRGINIA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WEST VIRGINIA

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QUESTION PRESENTED

Is A sexual abuse case, brought in a State Court, involving an adult accused, a minor victim, and a State statute, a case of such special circumstances that the opinion testimony of witnesses, testifying on behalf of the State should be regulated beyond that normal discretion allowed the Trial Court in such matters and that set forth in the State's Rules of Evidence and State cases construing those rules. If not, did the Trial Court deny Petitioner due process of law or equal protection of law by refusing to apply United States vs. Azure, 801 F.2d 336 (8th C.A. 1986), respecting the testimony of expert witnesses, in the within action.

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NO._____

IN THE SUPREME COURT OF THE UNITED STATES
AT
WASHINGTON, DISTRICT OF COLUMBIA

RUSSELL EMORY ATKINS
Defendant -Appellant-PETITIONER

VS.

STATE OF WEST VIRGINIA
Plaintiff-Appellee-RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

This Petition seeks review of a judgment of the Wayne County Circuit Court, Wayne County, West Virginia, Chaffin, Judge, where, after a Jury Trial, Petitioner was found guiltly of incest, with his alleged stepdaughter, Shelly Cox, in violation of Section 61-8-12 of the West Virginia Code[1], affirmed on appeal, by the West Virginia Supreme Court of Appeals, the Court of last resort of that State. The instant facts are, all material ways, those set forth in United States vs. Azure, 801 F.2d 336 (8th C.A. 1986). Yet, the West Virginia Court reached a different result, respecting the admissability of certain opinion testimony of various witnesses, who were called to testify, on behalf of the State. Similar witnesses were called on behalf of the government, in United States vs. Azure 801 F.2d 336 (8th C.A. 1986). The underlying question for review is whether the Trial Court acted properly[2].

The Eighth Circuit Court of Appeals, in a case of first impression, held that admission of testimony of the type admitted here was an invasion of the province of the jury and ordered a new trial [3].

OPINIONS BELOW

The Supreme Court of Appeals of west Virgina denied a properly perfected Appeal, without opinion. And, it did the same for a properly perfected Petition for reconsideration. Copies of these Orders, are included on pages A-35 and A-38 of the Appendix.

JURISDICTION

The Supreme Court of Appeals of West Virgina has twice refused a properly perfected appeal, that Court is the Court of last resort in the State of West Virginia, the first petition for relief, was filed within sixty days of the and this Writ was

was filed within sixty days of the and this Writ was properly and timely filed. A Petition to this Court is proper, therefore, pursuant to Supreme Court Rule 17.1, subsections (b) and (c). Invoking the jurisdiction of this Court is permitted by law, where the court of last resort in West Virginia denied an appeal, perfected by Petitioner, in which this claim was raised, but denied[4] [4] . Secondly, the Eighth Circuit Court of Appeals has decided a case of first impression, involving an important Federal question, which should be decided by this Court[5] . The question herein presented involves regulating the admissability of the opinion testimony of either experts, so called professionally trained witnesses, or lay persons giving opinion testimony, although the Azure court did not reach, for dispositional purposes, opinion testimony of lay persons.

CONSTITIUTIONAL PROVISIONS UNSOLVED

Amendments XIV, of the U. S. Constitution, as applied to the States, respecting due process and equal protection of the laws.

STATEMENT OF THE CASE

The within Trial Court was informed of United States vs. Azure 801 F.2d 336 (8th C.A. 1986), at all stages of the proceedings, after Petitioner's arraignment. Yet, that Court erroneously failed and refused to adhere to the very persuasive reasoning relied upon by the justices of the Eighth Circuit Court of Appeals. The West Virginia Supreme Court of Appeals failed and refused to sustain proper objections, and sustained the conviction, which allowed four witnesses to testify as to the ultimate question, to be decided by the jury, the credibility of the minor victim. This failure and refusal denied Petitioner due process of

law, as applied to the States through the Fourteenth Amendment to the United States Constitution, and was contrary to the Constitution of the State of West Virginia.

REASONS

TO GRANT THE PETITION FOR A WRIT

Applying United States vs. Azure 801 F.2d 336 (8th C.A. 1986) to the instant matter, violations of rights occured when, during the trial of the action, Respondent unfairly bolstered Shelly's credibility, prior to her taking the stand. In the instant matter, three of four witnesses, called to testify on behalf of the State, were trained in professions relating directly to the treatment of abused children, making their testimony that of an expert. As in United States vs. Azure 801 F.2d 336 (8th C.A. 1986), each expert witness was allowed by the trial Court, to tell the Jury that Shelly, the

minor victim, was telling the truth. Counsel for defendant objected[6] , but was overruled. The Court should not have permitted any witnesses, and certainly not expert witnesses, to testify as to whether or not they believe that Shelly was telling the truth.[7]

West Virginia bound itself to follow interpretations of the Federal Rules of Evidence, that are not in conflict with West Virginia cases already construing the same rule of evidence. The applicable Federal Rules of Evidence contain the same language as the rules of evidence in West Virginia. West Virginia has no case directly on point, respecting the question presented in to the Trial Court and in this Petition, but has adopted the general principles, respecting opinion testimony. Since it is clear that the legislature and the Courts in West Virginia were able to make the language in

its rules of evidence different from their Federal counterpart, the decision to make the rules contain the same language, bound West Virginia to adopting Federal cases construing the same rule of evidence.

CONCLUSION

Petitioner prays that the judgment be overturned, that he be ordered released and the charges against him dismissed. Or, in the alternative, Petitioner prays that a new trial be ordered.

Russell Atkins, By Counsel

Weiner, Ross, and Associates,

By: Jerry Weiner
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CERTIFICATE OF SERVICE

This is to certify under penalty of perjury that on 24 day of August, 1989 true and correct copies of the foregoing were mailed, postage prepaid, to the following:

Darrell Pratt
Wayne County Circuit Court
Wayne, West Virginia
Prosecutor

James Colburn
731 Fifth Street
Huntington, West Virginia
Special Prosecutor

and that copies required by the Supreme Court Rules were mailed, postage prepaid, to the Clerk of the Supreme Court of the United States, at Washington, D.C..

Charles A. McCrae, Attorney for Petitioner

[1] In the interest of brevity, the facts set forth in the Briefs filed with the West Virginia Supreme Court of Appeals and filed with the motion for extention of time in this matter, set forth, in splendid detail, all the facts relied upon by Petitioner. in this matter, and all collateral arguments, sought to be considered on appeal. Pursuant to Supreme Court Rule 28.1 and all other applicable rules of this Court, all such Briefs are h ereby incorporated, regarding the facts herein, and as to each and every argument set forth therein, regarding the facts herein, and as to each and every argument set forth therein, as if they were fully set forth herein.

[2] Collateral issues are not discussed in the body of the Petition, since they have independent support for their resolution and do not directly contribute to a full and fair adjudication of the broader issue. Collateral issues are, however, intended to be preserved for consideration by this Court, pursuant to the cognizant Supreme Court Rule. Petitioner is particularly interested in preserving issues, such as whether or not the Wayne Circuit Court erred, when it refused to allow Petitioner to prove, through extrinsic evidence, that the parties were not legally man and wife, at the time of the alleged event, so as to allow the trial court to instruct the jury on lesser included offenses, whether, the type testimony

claimed to have been erroneously admitted into evidence, could properly have been admitted after the victim's credibility had been called into question, as a result of her testimony on the stand, in the prosecution's case in chief, and others, which are raised by incorporation of the documents set forth above at fn.1, above.

[3] See United States vs. Azure 801 F.2d 336 (8th C.A. 1986), and the cases cited therein. See, also, U.S vs. Cecil, 836 F.2d 1431 (C.A., 4th Cir., 1988) at pp. 1441-1442.

[4] The appeal was properly filed in the court of last resort in West Virginia, denied and a motion for reconsideration was finally denied. The motion for leave to file a Petitinon was filed within sixty days of th efinal denial of that Court, and dufing dispositionof the motion for an extention of time to file the within Petition, the clerk was satisfied that the appeal to this Corut was timely filed. See, fn1, supra.

[5] The question, what may be received by the jury as opinion evidence, in general, has already been decided, and may not even a collateral issue presented herein. The issue presented for disposition herein, encumpasses whether the disparity between the young age of the victim and the fact that defendant is an adult defendant requires this Court to set special guidelines for

courts to follow, when faced with the decision of what opinion testimony the jury should receive, during the trial, and, at what point, during the trial it should be heard, since in the instant case the jury heard the opinion evidence prior to having heard the minor victim testify.

6 It should be noted that United States vs. Azure 801 F.2d 336 (8th C.A. 1986), at page 341, emphasized that the trial court's error was of such a magnitude that it was plain error, which did not need to be properly preserved, for appeal. To the extent, therefore, that any error alleged herein was not properly, at any other point in the proceedings, then Petitioner relies upon the language appearing at page 341, and the cognizant rule of criminal procedure, for the State of West Virginia.

7 In United States vs. Azure, 801 F. 2d 336 (8th C.A. 1986), rules 702 and 608 were under consideration, and were discussed at pages 339-341.

APPENDIX A

I.
STATEMENT OF THE CASE

This is an Appeal from a judgment of the Wayne County Circuit Court, Chaffin, Judge, finding, after a Jury Trial, Appellant guilty of incest, with his alleged stepdaughter, in violation of Section 61-8-12 of the West Virginia Code. At the filing of this Brief, Appellant is free on bond pending Appeal, and a motion accompanying this Brief seeks an Order from this Court that the Appeal is not frivolous on its face, and that Appellant may remain on bond, pending the outcome of the Appeal. A cash bond in the amount of ten thousand dollars ($10,000) has been placed in the custody of the Wayne County Circuit Court Clerk, until the Appeal is final, and the motion seeks an order allowing the bond amount to remain the same. The Circuit Court, Chaffin, Judge, gave Apellant until October 12, 1988 to obtain a favorable ruling on the motion referred to herein, on pain of reporting to the penal authorities, if the same is not

accomplished. The urgency of a ruling on the motion to which this brief is attached, therefore, obtains.

Appellant was married to Karen Cox on or about August 15, 1981. At the time of the marriage, Karen Cox had a daughter, Shelly. Shelly was not, in any way, related to Appellant. During the pendency of the within action, Appellant learned that, on August 15, 1981, his prior marriage was not dissolved by divorce. In fact, the prior marriage was not dissolved until November 26, 1982, more than one (1) year after Appellant married Karen. As a legal matter, therefore, the marriage between Appellant and Karen was void ab initio. The incest law of West Virginia does not recognize common law marriages, in its definition of a person who can be charged with incest. An extensive investigation was undertaken by the prosecutor, prior to indictment, and these matters were known. Yet, appellant was indicted and charged with incest.

Appellant and Karen lived together for more than four (4) years, had two (2) children, and were in the process of purchasing a home for the family, but on or about February 19, 1986, they separated. After the parties had been separated for about three (3) months, it is said that Karen became worried because Shelly had become disturbed and withdrawn. This condition is said to have been of such a nature and duration that Karen felt that she should take Shelly to Prestera Mental Health Center, Huntington, West Virginia. Both Karen and Shelly had previously received counseling at the center. On May 30, 1986, her first visit to the center relating to this matter, it is said that Shelly told a counselor that her stepfather had obtained carnal knowledge of her. And, she is said to have accurately described an incident which occurred between herself and her stepfather on or about September 23, 1985, nearly a year earlier. The incident, which formed the basis for the charge against Appellant, was said to have occurred at

the time when Karen was hospitalized, giving birth to the couple's daughter. Appellant is alleged to have returned home from the hospital, where at some point during the evening he forced Shelly to drink two glasses of "pop", causing her to feel "dizzy". Shelly alleged that Appellant later called her upstairs into the main bedroom, where he placed her on the bed, entered her vagina with his penis and, later, caused her to perform fellatio on him. Appellant and Karen had an infant son, Seth, who had accompanied Appellant both to and from the hospital. It was never clear as to Seth's location, as the acts described by Shelly occurred. Appellant was indicted on or about November 3, 1986. Trial was set in the matter for June 20, 1987, at which time Appellant appeared, stood on his prior plea, and participated in the Trial.

Prior to the Trial, a hearing was held <u>in camera</u>, relating to certain testimonial evidence which Appellant wanted to develop during trial, in defense of the charge. The evidence respected

two areas, one such area being the validity of the marriage between Appellant and Karen, as shown by the records which Appellant presented to the Court, as proffered Exhibits A and B. These Exhibits were accepted into evidence and are included in the record of this Appeal. Secondly, Appellant attempted to obtain an order directing the prosecutor to amend the indictment, so that it would reflect the legal relationship between Appellant and Shelly. By doing this, it is clear that Appellant was attempting to open the door to the introduce into evidence sufficient testimonial evidence to allow the Court to give a jury instruction on the lesser included offenses associated with sexual abuse of the first degree, a violation defined by Section 61-8B-7 of the West Virginia Code. The Court erroneously overruled these motions, Appellant preserved the ruling for Appeal, and the Trial began.

Over Appellant's continued objection, Appellee unfairly bolstered Shelly's testimony. Four expert witnesses were called to testify as

to Shelly's general credibility and her character for truthfulness, prior to Shelly taking the stand. While each such witness, during the introductory phase of the examination, gave some background related to Shelly and the alleged incident, the substantive portion of each examination focused upon whether or not what Shelly was alleging could be supported by the evidence that each witness had gathered during his or her portion of the investigation, and whether or not Shelly was telling the truth. Shelly's credibility had not been called into question, within the meaning of the cognizant rule of evidence. The Court erroneously overruled Appellant's objections to the testimony. Appellee also called Karen as a witness, prior to calling Shelly. The substantive portion of her testimony related to Karen's reason for taking Shelly to the center. Very little testimony was elicited about the divorce. The Court erroneously refused to allow Appellant to develop any motive for the accusation, by not

allowing Appellant to delve into the matters surrounding the divorce. Appellant had repeatedly asserted that the accusation was "made up" and that the motivation for Shelly's not telling the truth lay in certain arguments had between Appellant and Karen, which occurred during the divorce proceedings. Appellant properly preserved his objection to the nonallowance of the presentation of this evidence for Appeal.

Appellee also unfairly bolstered Shelly's credibility, because three of the four expert witnesses called were trained in professions relating directly to abused children, and each was allowed to tell the Jury, either directly or by inference, that he or she believed that Shelly was telling the truth. The Court erroneously refused to strike the testimony from the record or to instruct the Jury to ignore same. Appellant properly preserved the Court's erroneous ruling for Appeal. After deliberation, the Jury found Appellant guilty as charged, and this Appeal

followed. Appellant, therefore, asserts that the erroneous rulings by the Court raise the following, the issues upon which attempts to secure dismissal of the indictment and judgment against him, or, in the alternative, a new Trial.

ISSUES PRESENTED ON APPEAL

I.) THE INDICTMENT AGAINST APPELLANT SHOULD BE DISMISSED AND THE JUDGMENT OF GUILTY HELD FOR NAUGHT BECAUSE THE TRIAL COURT ERRED WHEN IT REFUSED TO ALLOW APPELLANT TO INTRODUCE EVIDENCE CONCERNING THE VALIDITY OF THE MARRIAGE BETWEEN APPPELLANT AND KAREN.

II.) THE INDICTMENT AGAINST APPELLANT SHOULD BE DISMISSED AND THE JUDGMENT OF GUILTY HELD FOR NAUGHT BECAUSE THE TRIAL COURT ERRED WHEN IT REFUSED TO ORDER THE INDICTMENT TO BE AMENDED TO SEXUAL ABUSE OF THE FIRST DEGREE.

III.) APPELLANT SHOULD BE GRANTED A NEW TRIAL BECAUSE THE TRIAL COURT ERRED WHEN IT PERMITTED EXPERT WITNESSES TO COMMENT ON SHELLY'S CREDIBILITY AND CHARACTER FOR TRUTHFULNESS PRIOR TO THOSE BECOMING ISSUES IN THE CASE.

IV.) APPELLANT SHOULD BE GRANTED A NEW TRIAL BECAUSE THE TRIAL COURT ERRED WHEN IT WHEN IT ALLOWED EXPERT WITNESSES TO TELL THE JURY THAT HE OR SHE BELIEVED THAT SHELLY WAS TELLING THE TRUTH, A QUESTION WHICH INVADES THE PROVINCE OF THE JURY.

V.) APPELLANT SHOULD BE GRANTED A NEW TRIAL BECAUSE THE TRIAL COURT ERRED WHEN IT WHEN IT REFUSED TO ALLOW APPELLANT TO DEVELOP A MOTIVE, BY INQUIRING INTO THE MATTERS SURROUNDING THE DIVORCE BETWEEN KAREN AND APPELLANT.

ARGUMENT ON THE ISSUES PRESENTED ON APPEAL

I.

THE INDICTMENT AGAINST APPELLANT SHOULD BE DISMISSED AND THE JUDGMENT OF GUILTY HELD FOR NAUGHT BECAUSE THE TRIAL COURT ERRED WHEN IT REFUSED TO ALLOW APPELLANT TO INTRODUCE EVIDENCE CONCERNING THE VALIDITY OF THE MARRIAGE BETWEEN APPPELLANT AND KAREN.

The major concern, with respect to this assignment of error, lay with the strict legal requirement of a valid marriage license existing between Appellant and Karen, in order for a charge of incest to lie. The requirement is not a factual matter, but is a legal matter, which seems to be the position that the Trial Court took with respect to the matter. The Trial Court took the view that the marriage was legal between Appellant and Karen, even though it was presented with concrete documents to demonstrate the contrary. At the

hearing, held prior to the Trial, (See, generally, T., pp. 3-12) Appellant tendered proffered Exhibits A and B designed to show that the marriage between Appellant and Karen was void ab initio. There was no App. dispute as to whether or not Appellant and Karen had lived together. They had. But, criminal statutes must be strictly construed. Section 61-8-12 of the West Virginia Code does not define the term "married", instead, it defines the term "father". See Section 61-8-12(4) of the West Virginia Code. Pursuant to that Section, the most plausible legal relationship existing between Appellant and Shelly lay in the final portion of the the definition: "the husband of the person's mother." Proffered Exhibits A and B clearly show that, as a purely legal matter, no marriage existed between Appellant and Karen on the date in question, notwithstanding their mistaken assumption to that effect. This means that

Appellant was not Karen's legal husband. A charge of incest cannot lie, absent a legal marriage. The Court should have ordered the Prosecutor to either dismiss or amend the indictment.

The error is clear and prejudicial to Appellant's right to a fair and impartial Trial, a right secured to him by the respective Constitutions of West Virginia and the United States of America. It is reversible error. To determine whether error constitutes reversible error, the test of State vs. Atkins 163 W.Va. 502, 261 S.E.2d 55 (1979); cert. denied, 445 US 904, 100 S. Ct. 1081, 63 L.E.2d 320 (1980) must be applied:

> "Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the

remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury."

See State vs. Smith, ___ W.Va.____, 358 S.E.2d. 188 (1987), page 198, citing Atkins, supra. See also State vs. Gum ___ W.VA___, 309 S.E.2d 32 (1983), Syllabus part 4. In fact, the familial requirement is such an important element of the crime of incest that, in the opinion of the Attorney General, an incest charge will not lie between an adoptive child and an adoptive father, unless the marriage requirement is met. See generally, United States ex rel Preece vs. Coiner, 150 F.S. 511 (N.D, W.Va, 1957) and 50 Op. Attorney General 263 (1963). Taking away the

prejudicial evidence, therefore, the Trial Court's error was not harmless, since it is clear that Appellant and Karen were not legally married, at the time of the alleged occurence and marriage is an essential element of the crime of incest. The judgment of guilty should be overturned and the indictment ordered dismissed.

II.

THE INDICTMENT AGAINST APPELLANT SHOULD BE DISMISSED AND THE JUDGMENT OF GUILTY HELD FOR NAUGHT BECAUSE THE TRIAL COURT ERRED WHEN IT REFUSED TO ORDER THE INDICTMENT TO BE AMENDED TO SEXUAL ABUSE OF THE FIRST DEGREE.

Appellant's Trial was prejudiced because the Court did not require Appellee to amend the Indictment to Sexual Abuse of the first degree, defined by Section 61-8B-7 of the West Virginia Code. There, the term "married" is defined, and the legal type of relationship which existed between Appellant and Karen is defined. Section 61-8B-1(2) of the West Virginia Code clearly distinguishes between common law and

solemnized marriages, to include both. No definition of "married" exists in Section 61-8-12 of the West Virginia Code. In addition, the offenses of incest and Sexual Abuse of the first degree are defined in different parts of the Of the West Virginia Code. Incest is defined in the section entitled CRIMES AGAINST CHASTITY, MORALITY AND DECENCY", whereas sexual abuse of the first degree is defined in the section entitled SEXUAL OFFENSES. A priori, it cannot be said that Sexual Abuse of the first degree is a lesser included offense of incest, due, not only to their different location within the West Virginia Code, but also to the familial requirement. There are no lesser included offenses of the crime of incest. By refusing to require the indictment to be amended, the Court, therefore, foreclosed any opportunity that Appellant would have had to obtain Jury Instructions relating to the lesser included offenses associated with sexual abuse of the first degree. Only an amendment could cure the

problem inherent in the indictment, unless it were the Court's position that the existence of a valid marriage between the parties was a Jury question. By denying Appellant the right to introduce proffered Exhibits A and B into evidence, however, the Court indicated that it believed the question to be a legal one.

Appellant's Trial was prejudiced because, even though there was evidence, which would have been clearly significant enough to warrant a Jury Instruction on any of the lesser included offenses associated with Sexual Abuse of the first degree, the refusal to order the amendment put the Court in a position to refuse to give any instruction on the lesser included offenses. There was testimony in the Trial, from which a Jury could have concluded that Sexual Abuse of the third degree occurred between Appellant and Shelly. The Trial Court, however, deprived Appellant of the opportunity to avail himself of such opportunity, because no such instruction could be allowed, without an amendment to the indictment. The Trial Court should have required

the indictment to be amended to Sexual Abuse of the first degree, if not during the Trial or after the Trial, then, either prior to the Trial or at the close of the Appellee's evidence. Cf., for similar acts where the charge was Sexual Abuse of the first degree, not incest, State vs. McFarland ___ W.Va. ___, 332 S.E.2d 217 (W. Va., 1985), and United States vs. Azure, 801 F.2 336 (8th C.A., 1986).

The Trial Court's error was reversible error, based upon the test set forth in State vs. Atkins ,163 W.Va. 502, 261 S.E.2d. 55 (1979); cert. denied, 445 U.S. 904, 100 S. Ct. 1081, 63 L.E.2d 320 (1980). The judgment of guilty should be overturned and the indictment ordered dismissed.

III.

APPELLANT SHOULD BE GRANTED A NEW TRIAL BECAUSE THE TRIAL COURT ERRED WHEN IT PERMITTED EXPERT WITNESSES TO COMMENT ON SHELLY'S CREDIBILITY AND CHARACTER FOR TRUTHFULNESS PRIOR TO THOSE BECOMING ISSUES IN THE CASE.

The first four (4) witnesses to testify at the Trial were persons whom the Jury could only consider as testifying as experts, within the meaning of Ev.R. 702 of the West Virginia Rules of Evidence, even though Appellee made no motion for an instruction to the Jury that they should consider the testimony as that of an expert. After a stiring opening statement, the first witness to testify was Mr. Rodney A. Pardue, a school psychologist, who interpreted tests which had been performed several years before on Shelly, relating to Shelly's ability to tell the truth. (T., p. 19 through 25). On page 25, this witness was asked to comment on Shelly's character for truthfulness, and was allowed to answer in a manner from which a Jury could have concluded that he was bolstering Shelly's credibility, by indicating that he did not "see anything pathological in any way," when ending his answer. The second witness to testify was Ms. Janet Dingman, a supervisor of the Children's Services Department at Prestera Center for

Mental Health Services. She testified to interviews that she and one (1) of her subordinates, Mr. William Kurtz, a student psychologist, at the time, had conducted with Shelly on the day that she was presented to the Center, May 30, 1986 (T., pp. 29 through 43). Begining on page 41 and ending on page 43, Appellee began a line of questioning specifically designed to elicit from the witness whether or not the witness had an opinion on Shelly's character for truthfulness, all over Appellant's objections, which were overruled. And, the witness was allowed to answer in the affirmative. On redirect examination, Appellee asked the question directly: "Ma'am do you have an opinion as to whether or not Shelly was telling the truth?" Over Appellant's objection, the witness was allowed to answer in the affirmative. Third to testify was Ms. Colette Gushurst, a medical doctor and pediatrician.

Dr. Gushurst, like Mr. Pardue, testified as to technical test which she had not personally

performed, but, were done on June 5, 1986. She also testified to some tests that she had personally done, but on June 16, 1986. The earlier test had been performed Dr. Sjahli, who was not available to testify. All the testimony related to medical examinations of Shelly's genitalia, and, particularly her vagina. (T., pp. 52 through 59). Appellee, in examining the physician, sought to bolster Shelly's character for truthfulness by obtaining an opinion that Shelly had had intercourse. See page 59. The fourth witness to testify at the trial was Ms. Charlotte J. Smith, a service worker for the Cabell County Department of Human Services, children's protection service. Her testimony described the means by which her department became involved in the matter and confirmed certain dates, which had been testified to by the previous witnesses. Essentially, however, her testimony was to confirm the yet to come testimony of Shelly Cox, as to the same dates (T., pp. 68 through 71). Next, was Karen Cox Atkins, Shelly's mother. Her

testimony related to establishing the September 23, 1986 date, as the date on which the alleged event occurred and to give other background information about Shelly and the other members of the family (T., pp. 72 through 79). Then, Shelly testified. Her testimony was essentially what the experts and her mother had already made clear to the Jury, except that she added the details of the alleged acts.

By proceeding with its case-in-chief in this manner, Appellee unfairly bolstered Shelly's testimony. All the witnesses who testified prior to Shelly, excluding her mother, testified that they believed what Shelly was saying, as demonstrated above. But, at that particular moment, the best evidence of what Shelly was saying was not before the Jury. Shelly had not testified. By the time that Shelly took the stand, except for the exact details of the alleged acts, her testimony was merely corroborative of the prior witnesses. The Jury was already

galvanized, respecting Shelly's character for truthfulness and her general credibility, by those prior witnesses. Appellant had no fair opportunity to attack or challenge her credibility or her character for truthfulness on cross examination, because of the Jury's knowledge of the prior testimony of the expert witnesses. It is obvious, that each of the witnesses, Pardue, Dingman, Gushurst, and Smith was testifying as an expert, within the meaning of Ev.R. 702, of the West Virginia Rules of Evidence, and that their status as experts made their opinions have even more weight with the Jury than a lay witness, giving an opinion, under Ev.R. 701, of the West Virginia Rules of Evidence. Whether or not they were testifying as experts, their testimony would be governed by Ev.R. 608, of the West Virginia Rules of Evidence. Evidence tending to affect a person's general credibility, including that person's character for truthfulness, cannot be introduced into evidence until after the person has been a witness, and has had his

credibility attacked or challenged. Ev.R. 608(a)(2), of the West Virginia Rules of Evidence. The meaning of Ev.R. 608, of the West Virginia Rules of Evidence is clear enough that it forbids any ideation that Appellant's plea of "not guilty" attacked or challenged Shelly's credibility, including her character for truthfulness, within the meaning of Ev.R. 608, of the West Virginia Rules of Evidence. The Trial Court, therefore, erred when it allowed even one of these expert witnesses to testify, as to matters relating to any part of the acts which were alleged to have occurred between Appellant and Shelly, as Shelly had previously told them, prior to her testifying. The West Virginia Rules of Evidence clearly contemplate this sequence of events. See, generally, Ev.R. 608, of the West Virginia Rules of Evidence.

And, the Trial Court's error was reversible error, based upon the test set forth in State vs. Atkins, 163 W.Va. 502, 261 S.E.2d. 55 (1979); cert. denied, 445 U.S. 904, 100 S. Ct. 1081, 63 L.E.2d.

320 (1980). Appellee called all its rebuttal witnesses, in its case in chief. The normal procedure for a criminal trial relates to first making the allegation of crime, by placing the crime victim on the stand for examination and cross examination. Secondly, without questioning or bolstering the veracity of its own prior witnesses, the State is obligated to bring as many eye witnesses or persons close to the actual event, as possible to testify. Then the State rests its case-in-chief, having established the occurrence of crime, proper venue, and, the jurisdiction of the Court over the subject matter and the accused, the elements of a good case in chief. Only if the accused, by way of defense, attacks the credibility of a State witness or the character for truthfulness of a State witness, may the State seek to bolster that witness's prior testimony, by presenting witnesses and evidence in rebuttal. This is clearly the approach considered appropriate by the Atkins Court, in stating the test for reversible error. See,

generally, State vs. Atkins ,163 W.Va. 502, 261 S.E.2d. 55 (1979); cert. denied, 445 U.S. 904, 100 S. Ct. 1081, 63 L.E.2d. 320 (1980). By conducting the Trial in the manner shown herein, Atkins, supra, would seem to have been compromised and the West Virginia Rules of Evidence were fully compromised, as set forth above.

The question becomes whether or not, when the offending evidence is removed, the error can be said to have been harmless. In this connection, it must be said that, since the witnesses were available at Trial, Appellee could have used them on rebuttal, and that the testimony would have been the same. But, they were not called on rebuttal, they were called in the case in chief. Should only the testimony offending the case-in-chief be removed, or should the entire testimony be removed from consideration, in order to determine whether or not the error was harmless. If the entire testimony were removed, then it would be clear that the Trial Court's error was not harmless. All

that would be left would be the testimony of Shelly and her mother, Karen. Karen testified, at page 77, that she did not observe any tension between Appellant and Shelly, prior to her hearing about the alleged act. Only later did Karen suspect that anything was wrong. That would be insufficient evidence for reasonable minds to conclude that the Appellant was guilty of the charge. Most importantly, at page 74, Karen admitted that Appellant was neither the natural nor the adoptive father of Shelly. Had the Court allowed Appellant to meet this evidence with proffered Exhibits A and B, it would be clear that the familial requirement for incest would not have been met. Thus, the error was not harmless; the familial relationship being an essential element of incest.

Assuming, arguendo, that reasonable minds would conclude that the error was harmless, then this Court should consider the ruling and language set forth in United States vs. Azure, 801 F.2 336 (8th C.A., 1986), since the language

of Ev.R. 702, of the West Virginia Rules of Evidence, and, all Of the West Virginia Rules of Evidence associated with an analysis of Ev. R. 702 of the West Virginia Rules of Evidence contain exactly the same language as its counterparts in the Federal Rules of Evidence. See, generally, U.S. v. Cecil, et al, 836 F.2d. 1431 (C.A., 4th Cir., 1988), at pp.1433 through 1444, . The actual appeal in Azure, supra, lay with the testimony of a social worker, when she was asked whether or not she believed the allegations made by a minor, about Shelly's age, relating to sexual abuse of the type set forth herein. The Azure Court, instead of primarily focusing on the social worker's testimony, turned its attention to the issue of whether asking an expert witness whether or not that witness believed a victim was telling the truth, impermissibly invaded the province of the jury. If so, was the invasion of such an extent that, even if the error were not properly preserved for appeal, it was so predjudicial that it

warranted a new trial, nonetheless. The Court found that such an error was so fundamentally prejudicial to a fair Trial that there was no choice but to order a new trial, even though the Defense had not properly preserved the issue for appeal, citing cases, including U.S. v. Rose, 731 F.2d. 1337, 1345 (C.A., 8th Cir), cert. denied, 469 U.S. 931, 105 S.Ct. 326, 83 L.Ed.2d. 263 (1984) . The same is urged herein. Child sex abuse cases are special type of cases, wherein, any doubt, as to the prejducial effect that any act or statement had upon the jury, should be resolved favor of the accused. Cf. State vs. Gum ___ W.VA___, 309 S.E.2d 32 (1983), Sylabus part 4, relating to the standard to be followed by the Court on a motion for directed verdict. This case was not a sexual abuse case and should be distinguished from the within issue.

The judgment of guilty should be overturned and held for naught, and Appellant should be granted a new trial.

IV.

APPELLANT SHOULD BE GRANTED A NEW TRIAL BECAUSE THE TRIAL COURT ERRED WHEN IT WHEN IT ALLOWED EXPERT WITNESSES TO TELL THE JURY THAT HE OR SHE BELIEVED THAT SHELLY WAS TELLING THE TRUTH, A QUESTION WHICH INVADES THE PROVINCE OF THE JURY.

This section relates to the testimony of the expert witnesss, as set forth above. Examining the testimony of Dr. Gushurst, it would appear that Plaintiff was aware of the questionability of asking a physician a direct question about his belief in the credibility of any witness. For example, see the discussion appearing in U.S. vs. Cecil 836 F.2d. 1431 (C.A. 4th Cir., 1988), at pp. 1441-1442, and the cases cited in the discussion. The real question, however, is whether asking the question in a case involving sex and a child victim would prejudice the jury within the meaning of Atkins, supra, making the error reversible. The answer must be in the affirmative. See United States vs. Azure 801 F.2 336 (8th C.A. 1986). The Azure Court was interpreting a rule with exactly the same

language as the rule in West Virginia. It found that sex cases involving child victim are special cases, and that, even though the error was not preserved for Appeal, but raising an objection to the question during the Trial, the question was fundamentally predjudice to Appellant's right to a fair Trial because it invaded the province of the Jury. This rule seems to be sound, where evidence, in the form of testimony, invades the province of the Jury, the Jury is predjudiced, within the meaning of Atkins, supra, and, therefore, reversible error. The judgment of guilty should be overturned and held for naught, and Appellant should be granted a new Trial.

V.

APPELLANT SHOULD BE GRANTED A NEW TRIAL BECAUSE THE TRIAL COURT ERRED WHEN IT WHEN IT REFUSED TO ALLOW APPELLANT TO DEVELOP A MOTIVE, BY INQUIRING INTO THE MATTERS SURROUNDING THE DIVORCE BETWEEN KAREN AND APPELLANT.

An examination of the transcript clearly reveals that the Court was adamant that Appellant could not introduce into evidence of

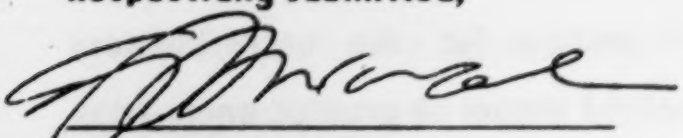
any motive for Shelly not telling the truth, that was connected with the divorce between Appellant and Karen. See, for example, the discussion had at the bench (T., p.76) where the Court clearly directed Counsel not to pursue any motive what Karen may have had for influencing Shelly to make up the entire matter. A fair interpretation of the discussion set forth at page 76 suggest that the Court believed that the evidence of the relationship existing between Appellant and Shelly was not admissable even, for the limited purpose of motive. Inquiry into that area would have opened the door for Appellant to develop the validity of the marriage defense to the action, in addition to the motive defense, it being clear that the Trial Court had already ruled that the issue of whether or not Appellant and Karen were married was a legal question rather than a factual question. The Trial Court erred, when it refused to develop a motive, in defense of the action, because it could have limited the purpose of the inquiry and could

have ordered Appellant to develop the motive matter independently of the marital status of Appellant and Karen. The error was reversible, within the meaning of Atkins, supra, because it prejudiced the jury against Appellant. Essentially, Appellant had no defense to the charge, because the Court closed the door to his developing a motive for the untruthfulness involved. Appellant shoudl be granted anew trial, where he can present Shelly's motive for consideration by the jury.

CONCLUSION

For the reasons set forth above, the indictment should be dismissed against Appellant and judgment against him should be held for naught, or, in the alternative, a new Trial should be ordered by this Court.

Respectfully submitted,



Charles A. McCrae
Attorney for Appellant
2023 Scioto Trail
Portsmouth, Ohio 45662
(614) 354-5300

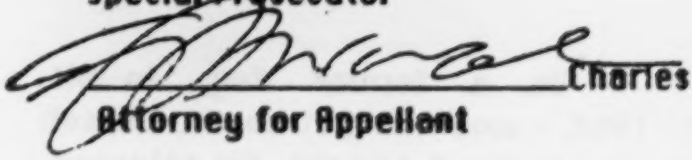
CERTIFICATE OF SERVICE

This is to certify that on 11th day of October, 1988 a true and correct copy of the foregoing was hand delivered, to the following:

Hon. Darrell Pratt,
Prosecutor
c/o Wayne County
Circuit Court
Wayne, West Virginia

AND

James Colburn
731 Fifth Street
Huntington, West Virginia
Special Prosecutor



Charles A. McCrae
Attorney for Appellant

STATE OF WEST VIRGINA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 26th day of October, 1988, the following order was made and entered.

State of West Virgina, Plaintiff Below, Respondent

vs. CASE NO. 86-F-73

Russell Emory Atkins, Defendant Below, Petitioner

On a former day, to-wit, October 13, 1988, came the petitioner, Russell Emory Atkins, by Charles H. McCrae, his attorney, and presented to the Court his petition praying for an appeal from a judgment of the Circuit Court of Wayne County, rendered on the 30th day of July, 1987, with the record therein accompanying the petition, which being seen and inspected by the Court the appeal prayed for is refused. Justice Neely would grant.

A True Copy

Attest: _____
Clerk, Supreme
Court of
Appeals

RECORDED
NOV-7 1988

CRIMINAL ORDER
Book 23 Page 134

STATE OF WEST VIRGINA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 1st day of February, 1989, the following order was made and entered.

FEB-9 1989
CRIMINAL ORDER
BOOK 23 PAGE 431

State of West Virgina, Plaintiff
Below, Respondent

vs. CASE NO. 86-F-73

Russell Emory Atkins, Defendant Below,
Petitioner

On a former day, to-wit, November15, 1988, came the petitioner, Russell Emory Atkins, by Henderson & Henderson, and Charles A. McCrae, his attorneys, and presented to the Court his petition uponsecond application praying for an appeal from a judgment of the Circuit court of Wayne county, rendered on the 12th day of July, 1988, with the record therein

accompanying the petition, which being seen and inspected by the Court the appeal prayed for is refused upon second application.

A True Copy

Attest:_____
Clerk, Supreme Court of Appeals